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Zoning

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ZONING

ELLIOTT HARRIS*

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INTRODUCTION

Zoning is perhaps the most important area of law affecting property values. Nothing pleases a property owner more than to have his property value increased by re-zoning; nothing upsets a client more than to have the value of his property decreased by re-zoning. Spurred on by Florida's rapid growth, property owners are constantly subjecting local units of government to pressure as they seek changes which would be beneficial to them. As a consequence of these realities, Florida's courts have been confronted with an abundance of suits brought in pursuance of attempts to increase property values by obtaining relief from zoning ordinances and suits brought to prevent a diminution in property values by blocking allegedly unfair zoning changes.

The procedures used in zoning cases by these litigants, the presumption of validity attaching to zoning ordinances, and the issues relating to substantive due process¹ arising out of the exercise of the police power to zone were among the major issues involved in Florida zoning cases during the past years.² The law regarding these concerns is the subject matter of this article.

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1. Substantive due process determines the governmental power to take or regulate life, liberty or property. This is distinguished from procedural due process. The former involves the validity of the exercise of governmental power; the latter is related to the procedures necessary to allow the governmental body to "take" or "regulate." Semet, *Florida Constitutional Law*, 18 U. MIAMI L. REV. 888, 897 (1964).

2. This survey encompasses the period October, 1963 to January, 1966, or more specifically, 160 So.2d 1 through 181 So.2d 160.

I. POWER SOURCE

As indicated by its consistent refusal to accept any zoning case for review since 1949,³ the United States Supreme Court considers the constitutionality of zoning ordinances settled insofar as the federal constitution is concerned.⁴ The decision of the Court in *Village of Euclid v. Ambler Realty Co.*⁵ virtually settled all constitutional questions relating to zoning enabling acts.

The power of the state to legislate in regard to the health, safety, morals and general welfare of the people, generally described by the term "police power," serves as the constitutional power source for every municipal and county zoning ordinance in Florida.⁶ Counties are political subdivisions of the state,⁷ and therefore have an inherent police power. However, the power of municipal authorities to exercise zoning regulations is neither inherent, absolute, nor unlimited. Municipal power is derived from a delegation of the state's legislative power which is generally vested in the municipalities through a general municipal zoning law.⁸

The municipalities can, therefore, exercise only such powers as are granted to them by the state, and must exercise them in the manner prescribed by the state.⁹ If their exercise of police power goes beyond that which is necessary to obtain protection for the public, then it is unreasonable and unconstitutional under Florida's due process clause.¹⁰

3. 1 RATHKOPF, ZONING & PLANNING 4-1 (3d ed. 1959) cited *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wisc. 262, 69 N.W.2d 217 (1955), *cert. denied*, 350 U.S. 841 (1955) as indicating the United States Supreme Court's reluctance to review zoning cases. The author contended that the court's refusal to review the constitutionality of the unusual ordinance in that case indicated that the federal constitutional problems with zoning ordinances have been settled. In *Wieland*, the Wisconsin court held that a village zoning ordinance constituted a valid exercise of police power although the ordinance gave wide discretion to the village building board. The regulation required that exterior architectural appeal of proposed buildings must satisfy the board that the buildings would conform to existing structures so that those existing structures would not depreciate in value because of the new buildings.

4. 1 RATHKOPF, *op. cit. supra* note 4.

5. 272 U.S. 365 (1926).

6. 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 38.03 (1964); 1 RATHKOPF, ZONING & PLANNING 2-1 (3d ed. 1959); Wright, *Zoning Under the Florida Law*, 7 MIAMI L.Q. 324, 325 (1953).

7. FLA. CONST. art. VIII, § 1.

8. Fla. Laws 1939, ch. 19539, at 1248; FLA. STAT. ch. 176 (1965). The legislature validly delegated this power to the municipalities. FLA. CONST. art. VIII, § 8 provides: "The Legislature shall have power to establish, and to abolish, municipalities to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time." Prior to the adoption of this general zoning statute, Florida municipalities obtained power to zone through special legislative acts or proceeded to restrict the use of land under the theory of nuisance. See generally Wright, *Zoning Under the Florida Law*, 7 MIAMI L.Q. 324, 325-334 (1953).

9. *Ellis v. City of Winter Haven*, 60 So.2d 620 (Fla. 1952); *State ex rel. Helseth v. Du Bose*, 99 Fla. 812, 128 So. 4 (1930).

10. *City of Miami Beach v. Lachman*, 71 So.2d 148 (Fla. 1953); *Forde v. City of Miami*

This necessity is determined by an inquiry as to whether there exists the necessary direct relationship between the regulation and the result it seeks to accomplish.¹¹

A zoning ordinance may be valid and constitutional as generally applied, but invalid as applied to particular property. For example, the zoning ordinance in *Reynolds v. Town of Manalapan*¹² prohibited the erection of a structure other than a house in a residence district; the ordinance specified that only houses, with no outbuildings to be used as dwellings, could be erected on the lots that extended the width of the zoned island, from the ocean to a lake. The property in question was subsequently divided by a highway, separating a residence on one side from a beach house on the other; the beach house was rented as a complete living unit. It was held that the ordinance was generally valid, but was arbitrary as applied to the lot in question. The highway was a barrier rendering the property on one side incapable of use as a "unit" which included the property on the other side.

II. PROCEDURAL ISSUES

1. *Presumptions and Burdens: The Fairly Debatable Rule*

Prior to 1939, the burden was on the municipality to prove its power to restrict the use of land by zoning ordinances. The basic tenet was that ordinances in derogation of common law should be strictly construed in favor of the individual. After the Florida Municipal Zoning Law was adopted, there was no need to apply this doctrine to cases contesting such legislation regarding land use because there was now an express delegation of power. Typically the benefit of a presumption was initially sought by the landowner when he contested the validity of an ordinance. Although the presumption is rebuttable, in recent years it has shifted so as to favor the legislative body; thus the person attacking the ordinance

Beach, 146 Fla. 676, 1 So.2d 642 (1941); *Dade County v. Pepper*, 168 So.2d 198 (Fla. 3d Dist. 1964).

FLA. CONST. DECL. OF RIGHTS § 12 states that "No person shall be . . . deprived of life, liberty or property without due process of law; nor shall private property be taken without just compensation."

Florida's equal protection clause, FLA. CONST. DECL. OF RIGHTS § 1, is a safeguard against discriminatory abusive use of the police power.

11. The purpose of zoning is to provide a comprehensive plan to lessen the congestion on the highways; to secure safety from fire; to promote health, safety, morals, convenience and the general welfare; to provide adequate light and air; to prevent the over-crowding of land and water; to avoid undue concentration of population; to facilitate the adequate provisions of transportation, water, sewage, schools, parks and other public requirements, with the view of giving reasonable consideration, among other things, to the character of the district or area and its peculiar suitability for particular uses and with a view to conserving the value of buildings and property and encouraging the most appropriate use of land and water.

FLA. STAT. § 176.04 (1965); *DADE COUNTY, FLA., METROPOLITAN CODE* § 33-311 (1959); 35 FLA. JUR. *Zoning Laws* § 2 (1961).

12. 167 So.2d 607 (Fla. 2d Dist. 1964).

now has the onus of proving its invalidity. This presumption sustains the legislative intent even when the validity of the ordinance is *fairly debatable*.¹³

The second district, however, recently interpreted the Florida Supreme Court's decision in *Burritt v. Harris*¹⁴ to mean that this presumption is to favor the party contesting the validity of a zoning authority; i.e., that the *fairly debatable* doctrine has been overruled.¹⁵

Burritt purchased the property in question in 1957 with full knowledge that, although adjoining the Jacksonville Imeson Airport, it was zoned "Residence A."¹⁶ Subsequently, Burritt tried several times to have the various county administrative bodies rezone his property to "Industrial A,"¹⁷ the more restrictive of two industrial zoning classifications. After exhausting his administrative remedies without success, Burritt brought an original suit in equity¹⁸ to review the decision of the county zoning board and have the court declare the "Residence A" classification void as unreasonable and arbitrary. Burritt contended that he was being deprived of his property without due process of law because of the confiscatory effect of the ordinance.

The landowner submitted evidence to show that the property was unfit for residential uses. The airport noises, obnoxious odors and smoke from nearby industries meant that the property would not qualify for Veterans Administration or Federal Housing Administration loans, and further, he showed that similar property in the area had been rezoned "Industrial."

13. 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 38.08 (1964); Wright, *Zoning Under the Florida Law*, 7 MIAMI L.Q. 324, 334-341 (1953).

14. 172 So.2d 820 (1965).

15. By this holding [*Burritt v. Harris*] the Supreme Court has created an innovation in the zoning law of Florida by casting on the zoning authority the burden of establishing by a preponderance of evidence that the zoning restrictions under attack "bear substantially on the public health, morals, safety or welfare of the community" if the ordinance is to be sustained. *Lawley v. Town of Golfview*, 174 So.2d 767, 770 (Fla. 2d Dist. 1965).

16. Property zoned as "Residence A" has its use thereby restricted exclusively to residences, publicly owned and operated recreational facilities, churches and schools, and non-commercial boat piers or slips for docking private watercraft, and accessory buildings.

Burritt v. Harris, 166 So.2d 168, 170 (Fla. 1st Dist. 1964).

As the landowner was challenging the validity of the ordinance, it was immaterial that the land was already so zoned when he acquired the property. 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 38.10(4) (1964).

17. Property zoned "Industrial A" by the zoning regulations may be used for light to medium manufacturing and industry, including sawmills and machine shops, for certain commercial uses, and for retail establishments.

Burritt v. Harris, *supra* note 6, at 171.

18. The county originally made a motion to dismiss the complaint from the circuit court on the ground that an original suit did not lie in equity to review a decision of a county zoning board, and that such decision could only be review by certiorari. The chancellor denied this motion and was upheld by the second district when the county took an interlocutory appeal from the denial of the motion. *Harris v. Burritt*, 151 So.2d 645 (Fla. 1st Dist. 1963). See section on Judicial Review, *infra*, especially note 72 and the discussion of *Harris v. Goff*, 151 So.2d 642 (Fla. 1st Dist. 1963).

However, the county established that even without rezoning the property had increased in value; the Federal Aviation Administration was already concerned about the emission of smoke in the area (a safety factor); and the roads leading to the property were not of a sufficient quality to be used in an industrial area.

The circuit court dismissed the complaint. The second district affirmed¹⁹ on the theory that it was not *conclusively shown*²⁰ that the regulations of the zoning boards deprived the appellant of his property without due process, nor did the regulations unreasonably infringe on other state or federal constitutional guarantees.²¹ The decision apparently means that when the action of the zoning board is not proved to be either arbitrary or unreasonable, but its validity is *fairly debatable*, the legislative judgment will be sustained.

Justice Rawls dissented,²² contending that the appellant had sustained the burden placed upon him by proving that his property was unsuitable for the restrictive use applied to it. The burden of presenting a debatable issue, that is the "burden of going forward"²³ as to the reasonableness of the strict classification, then fell upon the county board.²⁴ Rawls' dissent stated that no debatable issue was presented by the county because the uncontradicted testimony was to the effect that the property was unsuitable for residences and therefore Burritt was being deprived of the beneficial use of his property. To the dissent, it was fundamental that there be a right to devote one's real property to a legitimate use and that this right should not be curtailed by unreasonable restrictions under the guise of police power.

Justice Rawls' dissenting opinion appears to have been adopted by the Florida Supreme Court. On certiorari, the Board of County Commissioners tried to sustain the district court's decision by putting emphasis on the "safety" factor. The supreme court held that the Board's continued zoning classification of Burritt's property was not motivated by a fear of increased hazard around the airport; therefore, it had not been demonstrated that the classification had any relation to health, morals,

19. *Burritt v. Harris*, 166 So.2d 168 (Fla. 1st Dist. 1964).

20. Emphasis supplied.

21. If the restrictions on private property are not kept within the limits of necessity for the public welfare, it is considered an unlawful taking. *Averne Bay Constr. Co. v. Thatcher*, 278 N.Y. 222, 15 N.E.2d 587 (1938). FLA. CONST. DECL. OF RIGHTS § 12 (just compensation clause); FLA. CONST. DECL. OF RIGHTS § 1 (equal protection); U.S. Const. amend. XIV, § 1 (equal protection).

22. *Burritt v. Harris*, *supra* note 19, at 175.

23. 2 BOYER, *op. cit. supra* note 6, § 38.08(1) contends that this burden is not simply one of going forward with the evidence, but is a burden of proof.

24. In a zoning case, the burden of going forward with the pleading and presentation of evidence rests on the person contesting the validity of a zoning ordinance, but thereafter the *burden of proof* of the reasonableness of the means employed and the reasonableness of the effect on the plaintiff's property rights rests on the [legislative body]. *Wright, op. cit. supra* note 8, at 341. (Emphasis added.)

safety or the general welfare. To the court, the Board had failed to demonstrate that the question was debatable.

One of the reasons, of course, for the existence of the fairly debatable rule is the principle that courts generally should not substitute their judgment for that of the local legislative body. This means that courts will not indulge in rezoning.²⁵ As the second district put it:

To better understand the reluctance on the part of a court to re-zone, and the theory behind the principle, it must be borne in mind that zoning regulations . . . are concerned with innumerable, detailed items normally involving definitions, general provisions, exceptions, special requirements, districting, administration, and provisions for a Board of Adjustment. In each of the various districts, numerous uses are permitted and innumerable uses are prohibited. Thus, it may be seen that where . . . a court has determined that a denial to a party of a specific use of its property is unreasonable and arbitrary and that the zoning is therefore void as to the property of that party, and the court directs that the zoning authorities may re-zone said property within a specified time, then such re-zoning is subject to the usual judgment and discretion of the zoning authorities in adopting the many details of zoning regulations . . .²⁶

This, of course, conflicts somewhat with the traditional view that:

[T]he doctrine of *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed 60, [is] applicable. 'When it is clear that a statute transgresses the authority vested in the legislature by the constitution, it is the duty of the courts to declare the act unconstitutional because they cannot shrink from it without violating their oaths to office. This duty of the courts to maintain the constitution as the fundamental law of the state is imperative and unceasing' and applies as imperatively when properly invoked against a zoning ordinance as it does against an act of the legislature. . . .²⁷

The judiciary of this state has traditionally protected an individual's rights from the arbitrary edicts of the other arms of government, and once it ceases to fulfill this role, we then may contemplate the full impact of the heel of autocratic bureaucracy.²⁸

In *Watson v. Mayflower Property, Inc.*,²⁹ intervening property owners on the west shore of a two-hundred-foot-wide lake offered opinions

25. *Sarasota County v. Walker*, 144 So.2d 345 (Fla. 2d Dist. 1962); *Village of Pembroke Pines v. Zitreen*, 143 So.2d 660 (Fla. 2d Dist. 1962); *Schoenith v. City of South Miami*, 121 So.2d 810 (Fla. 3d Dist. 1960).

26. *Hillsborough County v. Twin Lakes Mobile Home Village*, 166 So.2d 191, 194 (Fla. 2d Dist. 1964).

27. *City of Miami Beach v. Lachman*, 71 So.2d 148, 150 (Fla. 1953).

28. *Burritt v. Harris*, *supra* note 19, at 182 (dissenting opinion).

29. 177 So.2d 355 (Fla. 2d Dist. 1965).

that their land value would decrease if the subject property was rezoned to permit hotels and apartment houses because: (1) breezes, sunshine and a view of the sunrise over the ocean would be lost; (2) traffic on the west side of the lake would increase, causing noise, congestion and dirt. Unfortunately it was not factually shown that these losses would be sustained and counter-opinions were offered to the effect that any increase in traffic would not be "through" traffic, therefore that there would be no effect on the property values of the intervenors. The city argued that the lower court erroneously held the fairly debatable rule inapplicable, as reasonable men could differ in their conclusions, the evidence did not conclusively demonstrate that private property interests were being confiscated for the benefit of adjoining landowners. These arguments made it necessary for the court to review the facts as found by the Chancellor to see if the fairly debatable rule applied.

To be valid, a zoning ordinance must have a substantial relationship to the public health, safety, morals, or general welfare. Florida courts will hold a zoning ordinance invalid when it clearly appears that the restrictions are arbitrary and unreasonable. An ordinance may be fairly debatable when it is open to dispute on grounds that make sense to Florida courts. If the validity of the ordinance is fairly debatable, the court should not substitute its judgment for that of the enacting governmental agency.³⁰

The holding in *Mayflower* seems unassailable when based on the conclusion that the ordinance was not even fairly debatable. However, because of the earlier decision in *Lawley v. Town of Golfview*,³¹ and because of the great weight apparently placed on the fact that the property in question would be of much greater value with a less restricted classification, two questions are raised:

(1) Did the second district recede from its position in *Lawley* where the court contended that the Florida Supreme Court decision in *Burritt v. Harris* abrogated the fairly debatable rule in Florida and that the onus of establishing the constitutional validity of an ordinance was now on the legislative body promulgating the regulation? If not, why did the second district in *Mayflower* treat as an issue whether or not the landowner had established that the ordinance was not fairly debatable, as the city offered *no* evidence?³²

(2) Was the holding in fact based upon purely economic considerations? It has been held that under Florida substantive due process, economic impact (financial property loss) by itself will not bar a valid

30. *City of Miami Beach v. Lachman*, 71 So.2d 148 (Fla. 1953); *Sarasota County v. Walker*, 144 So.2d 345 (Fla. 2d Dist. 1962). 35 FLA. JUR. *Zoning Laws* § 10 (1961).

31. 174 So.2d 767 (Fla. 2d Dist. 1965). See text accompanying note 15 *supra*.

32. *Watson v. Mayflower Property, Inc.*, 177 So.2d 355, 361 (Fla. 2d Dist. 1965).

exercise of police power.³³ Obviously the court in *Mayflower* concluded that the burdensome restriction was on the border of being confiscatory because of the variation in price that a more liberal classification would bring.³⁴

2. Notice

A city can be authorized to enact zoning ordinances in the exercise of the police power of the state, but in promulgating such regulations, there must be strict adherence to procedural due process of law—adequate notice and a public hearing held before the adoption of such regulations.³⁵

What is adequate notice? It must apprise the public of the suggested changes and the zoning amendment as ultimately adopted must conform substantially to the changes as publicized in the notice.³⁶ A deviation may be immaterial where the variance is a liberalization of zoning, rather than an enlarged restraint on the property involved. Upgrading a zoning regulation from that which is requested is not a deviation from the hearing for which notice was given. In *McGee v. City of Cocoa*³⁷ there was found sufficient notice of a requested zoning change for seven lots from residential to wholesale commercial. At the hearing the city granted the request for five lots, but limited the remaining lots to uses more restrictive than wholesale commercial. A party contesting the validity of the change had no cause to argue "lack of notice" as to the two lots. The party was not prejudiced by the failure of the city to zone at a more liberal classification. Conversely, if the zoning change had been more liberal than that which was requested, a party could have contested the validity of the resolution because of "lack of notice."

3. Hearing

The hearings held by the zoning authorities fall into two categories.³⁸ The first, a hearing held prior to the adoption of a zoning ordinance or

33. *State v. Farrey*, 133 Fla. 15, 182 So. 448 (1938); *Town of Surfside v. Abelson*, 106 So.2d 108 (Fla. 3d Dist. 1958), *cert. denied*, 111 So.2d 40 (Fla. 1950). *Cf.*, *Abdo v. City of Daytona Beach*, 147 So.2d 598 (Fla. 1st Dist. 1962).

34. See generally 2 BOYER, *op. cit. supra* note 6, § 38.09(3)(b).

35. *City of Hollywood v. Pettersen*, 178 So.2d 919 (Fla. 2d Dist. 1965).

36. FLA. STAT. § 176.05 (1965).

No such regulation, restriction, or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least fifteen days notice of the time and place of such hearing shall be published in a newspaper of general circulation in said municipality and if there be no newspaper published within the municipality then three notices shall be published in at least three conspicuous places within the municipality including the city or town hall as the case may be.

37. 168 So.2d 766 (Fla. 2d Dist. 1964).

38. See generally 1 DAVIS, *ADMINISTRATIVE LAW TREATISE* § 6.05 (1958); 8 McQUILLIN, *MUNICIPAL CORPORATIONS* § 25.251 (3d ed. rev. 1957); 1 YOKLEY, *ZONING LAW & PRACTICE* § 127 (2d ed. 1953).

amendment, is classified as an administrative legislative hearing. The second, when the action of the zoning body is particular and immediate, rather than general and prospective in regard to property, is called an administrative quasi-judicial hearing. For example, a hearing regarding the issuance of a variance permit would be in this second class as it affects only the applicant and his neighbors or competitors.

a. ADMINISTRATIVE LEGISLATIVE HEARING

The Municipal Zoning Laws have been construed to require³⁹ the local governing body to provide a full, public hearing before enacting a zoning regulation.⁴⁰ These provisions of notice and hearing cannot be disregarded or relaxed even when regarded as an emergency measure.⁴¹

In *City of Miami Beach v. State*,⁴² after the hotel's application for a building permit had been rejected because of an objectionable stairway, the city passed an emergency "set back" ordinance. If valid, the ordinance would have made it impossible for the hotel to build its proposed fourteen-story addition. When the hotel's original building plans were amended to rectify the stairway defect, the city again rejected the application on the ground that the plans did not comply with the "set back" ordinance. The hotel brought mandamus proceedings against the city to compel the issuance of a building permit. It was held that the emergency ordinance was invalid in that the city did not comply with the notice and hearing requirements of the applicable statute.

b. ADMINISTRATIVE QUASI-JUDICIAL HEARINGS

Quasi-judicial hearings of local governing bodies are more like trials than the legislative hearings in that the procedure is more formal and questions of fact are decided.⁴³ Because the decisions of the administrative body acting in this capacity affect the property rights of particular individuals, strict compliance with notice and hearing requirements is necessary to satisfy the constitutional safeguard of procedural due process.⁴⁴

Drogaris v. Martine's, Inc.,⁴⁵ described an administrative quasi-judicial hearing:

39. 2 BOYER, *op. cit. supra* note 6, § 38.06(1)(4).

40. FLA. STAT. § 176.05 (1965), construed by *Town of Hillsboro Beach v. Weaver*, 77 So.2d 463 (Fla. 1955) and *City of Hollywood v. Rix*, 52 So.2d 135 (Fla. 1951).

41. *City of Miami Beach v. State ex rel. Fontainebleau Hotel Corp.*, 108 So.2d 614 (Fla. 3d Dist. 1959), *cert. denied*, 111 So.2d 437 (Fla. 1959).

42. *Ibid.*

43. *McRae v. Robbins*, 151 Fla. 109, 9 So.2d 284 (1942).

44. *Alloway & Knight, Trends in Florida Constitutional Law*, 16 U. MIAMI L. REV. 685, 724-728 (1962); *Foss, Interested Third Parties in Zoning*, 12 U. FLA. L. REV. 16, 43 (1959).

45. 118 So.2d 95, 96 (Fla. 1st Dist. 1960) (Florida Industrial Commission had denied the litigant the right to compulsory attendance of a witness in an unemployment compensation controversy.), quoting from 42 AM. JUR. *Public Administrative Law* § 137 (1942).

An administrative hearing in the exercise of judicial or quasi-judicial powers must be fair, open, and impartial. The right to such a hearing is an inexorable safeguard and one of the rudiments of fair play assured to every litigant by the Fourteenth Amendment as a minimal requirement. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored. The breadth of administrative discretion places in a strong light the necessity for maintaining in its integrity the essentials of a fair and open hearing. When such a hearing has been denied, the administrative action is void.

These due process requirements also allow the litigant to be represented by counsel, to present evidence in support of his position, and to cross-examine adverse witnesses whose testimony is offered at the hearing.⁴⁶

If the administrative board insists that its quasi-judicial rulings made at the hearing be reviewed only by certiorari, the board is obliged to see that a proper record of the proceeding is made, including findings and conclusions based on the evidence.⁴⁷

4. *Standing*

A decision of a zoning board may be attacked by any person affected by that decision.⁴⁸ Any person who is in doubt as to his rights and status under a municipal ordinance may obtain a declaration thereof.⁴⁹ For example a competitor of the party that desired a variance to allow a liquor lounge within twenty-five hundred feet of another liquor licensee had standing to contest the variance permit.⁵⁰

The Florida Constitution granted Dade County its Home Rule Charter, under which the Board of County Commissioners was empowered to adopt ordinances relating to the property located in the unincorporated areas of Dade County.⁵¹ The Zoning Appeals Board was created pursuant to the Home Rule Charter to utilize the county's zoning powers.⁵² Its purpose was to provide a board to hear, consider and review appeals from the zoning regulations or decisions of an administrative official. Any aggrieved person whose name appears of record may

46. *Bloomfield v. Mayo*, 119 So.2d 417 (Fla. 1st Dist. 1960).

47. *Harris v. Goff*, 151 So.2d 642 (Fla. 1st Dist. 1963).

48. FLA. STAT. § 176.11 (1965).

49. See generally Foss, *Interested Third Parties in Zoning*, *op. cit. supra* note 44.

50. *City of Miami v. Franklin Leslie, Inc.*, 179 So.2d 622 (Fla. 3d Dist. 1965).

51. FLA. CONST. art. VIII, § 11(1)(b). DADE COUNTY, FLA., METROPOLITAN CODE § 33-303 (1959) made the procedures set out in that chapter exclusive in the unincorporated areas of the county.

52. DADE COUNTY, FLA., HOME RULE CHARTER § 4.08 (1959).

contest the action of the Zoning Appeals Board by petition to the Board of County Commissioners.⁵³

In a 1965 decision, the owner of a bar was granted an exception by the Zoning Appeals Board to enlarge his facility to a night club a church located within twenty-five hundred feet of the property appealed to the Board of County Commissioners and obtained a reversal. The bar owner then brought suit for a declaratory decree in the circuit court to determine if the church had standing to appeal the original ruling of the Zoning Appeals Board. The church had not objected at the Zoning Appeals Board hearing. The chancellor held that the church was precluded from appealing the Zoning Appeals Board's decision; therefore, the later action by the Board of County Commissioners was void. On appeal, the chancellor was reversed. The mere appearance of the church in an exhibit that was required of the bar owner before the Zoning Appeals Board gave the church sufficient standing to appear before the Board of County Commissioners without having previously contested the Zoning Appeals Board's action.⁵⁴

5. *Exhaustion of Administrative Remedies*

Generally, review procedures of administrative bodies must be exhausted before subsequent judicial appellate review is available.⁵⁵

The Code of Metropolitan Dade County provides that a three-fourths majority vote is necessary for the Zoning Appeals Board to approve an application for a variance.⁵⁶ In *Hasam Realty Corp. v. Dade County*,⁵⁷ an application for a variance was not approved as it received a vote of seven for approval and two against, with one abstention. As provided by the code,⁵⁸ an appeal was taken to the Board of County Commissioners. Before the hearing on the appeal, the appellant filed suit in the circuit court to determine the effect of the vote of the Zoning Appeals Board. This complaint was dismissed with prejudice because there was no cause of action when the complaint was filed. Appellant should have exhausted his administrative remedies. The third district affirmed.

Furthermore, even when the Board of County Commissioners later affirmed the Zoning Appeals Board's denial of the variance, the defect

53. DADE COUNTY, FLA., METROPOLITAN CODE § 33-313 (1959).

54. *Dade County v. Jim's Northwest, Inc.*, 171 So.2d 612 (Fla. 3d Dist. 1965).

55. A legislative body may waive the right to demand that a complainant exhaust his administrative procedures for review by not raising this defense. If the validity of the entire ordinance is attacked, as contrasted with the claim that an ordinance is invalid as applied to a particular property, judicial relief is available by an original suit in equity without exhausting the administrative processes. 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 38.13 (1964). See text accompanying notes 64 to 73, *infra*, regarding judicial review.

56. DADE COUNTY, FLA., METROPOLITAN CODE § 33-308 (1959).

57. 178 So.2d 747 (Fla. 3d Dist. 1965).

58. DADE COUNTY, FLA., METROPOLITAN CODE § 33-313 (1959).

in the circuit court suit was not remedied by the accrual of a valid cause of action after the complaint was filed.

When justified by a compelling public interest, it may not be a denial of procedural due process for an administrative official to summarily revoke a business permit as long as there is a right of review within the administrative framework subsequent to the order of revocation.⁵⁹ For example, a dump operator's conditional use and occupancy permit was revoked by the county building and zoning director. He immediately petitioned the circuit court for an injunction, without appealing to the Board of County Commissioners. The summary decree in favor of the zoning official was upheld on appeal. Exhaustion of administrative remedies is a prerequisite to judicial relief.⁶⁰

It is, however, unnecessary to pursue administrative remedies when it is shown that the effort would be fruitless. In *Hillsborough County v. Twin Lakes Mobile Home Village, Inc.*⁶¹ the landowner had availed himself of every administrative procedure before he obtained judicial relief that his land was zoned too restrictively. The county made a slight zoning change to comply with the decree, but not a sufficient change to enable the owner to obtain beneficial use of the land. The landowner's "motion of summary post decretal order" was not overcome by the county's demand that the administrative procedures be exhausted once more. Forcing the landowner to go back through administrative procedures could result in endless litigation. When a court directs the zoning authorities to rezone property, the rezoning is generally subject to the discretion of the zoning authorities, "but the party has an adjudicated right to the use of its property for the purposes found by the court to be reasonable and proper."⁶²

6. Judicial Review

A trilogy of cases⁶³ led the third district to explain the proper method of obtaining judicial review from the various zoning authorities.

Judicial review as provided for under the municipal zoning statute requires a petition to the circuit court to issue a writ of certiorari to test

59. *Larson v. Warran*, 132 So.2d 177 (Fla. 1961) (driver's license), noted, 16 U. MIAMI L. REV. 477 (1962); *Thornhill v. Kirkman*, 62 So.2d 740 (Fla. 1953) (driver's license).

60. *Crudele v. Cook*, 165 So.2d 424 (Fla. 3d Dist. 1963). DADE COUNTY, FLA., METROPOLITAN CODE § 33-316 (1959) provides "No person aggrieved by any . . . order . . . of an administrative official . . . may apply to the court for relief unless he has first exhausted the remedies provided. . . ."

61. 166 So.2d 191 (Fla. 2d Dist. 1964).

62. *Id.* at 194.

63. *Sun Ray Homes, Inc. v. Dade County*, 166 So.2d 827 (Fla. 3d Dist. 1964); *Dade County v. Carmichael*, 165 So.2d 227 (Fla. 3d Dist. 1964); *Dade County v. Markoe*, 164 So.2d 881 (Fla. 3d Dist. 1964).

the legality of a decision of a municipal board of adjustment.⁶⁴ This review is in the nature of a trial *de novo*.⁶⁵ Evidence is offered and the court is authorized to make an independent determination of the quasi-judicial, administrative decision. This statute does not, however, apply to the quasi-judicial determinations of a board of county commissioners.⁶⁶ In *Dade County v. Carmichael*,⁶⁷ the aggrieved landowner petitioned the circuit court to issue a writ of certiorari to review the action of the county zoning authorities. A transcript of the proceeding of the Zoning Appeals Board and the resolution of the Board of County Commissioners was attached to the petition. The chancellor permitted the landowner to enter additional evidence over the objection of the county. When the circuit court ordered rezoning, the county appealed. The third district reversed with directions to the circuit court to base its decision on the records of the boards and to take no new evidence into consideration.⁶⁸

The courts are not allowed to look into the motives of a legislative body, nor are the courts allowed to review acts of a legislative body by traditional certiorari. Only those decisions of an administrative board which have a judicial or quasi-judicial character are subject to review in such proceedings.⁶⁹ In *Dade County v. Markoe*,⁷⁰ the Board of County Commissioners ignored the recommendations of both its Zoning Appeals Board and its Building and Zoning Department, and issued a resolution allowing the landowner to use his property for business. On rehearing, initiated at the request of neighboring property owners, the Board adopted another resolution rescinding its earlier action. The landowner then filed a petition in the circuit court for a writ of certiorari⁷¹ to challenge the

64. FLA. STAT. § 176.16 (1965).

Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, or any taxpayer, or any officer, department, board or bureau of the governing body of said municipality, may present to a circuit court a petition for issuance of a writ of certiorari, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality in the manner and within the time provided by the Florida appellate rules.

65. A proceeding in the circuit court in the nature of a trial *de novo* is reviewable in the district court of appeal. *Josephson v. Autrey*, 96 So.2d 784 (Fla. 1957). See generally, 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 38.14 (1964).

66. *Harris v. Goff*, *supra* note 47.

67. 165 So.2d 227 (Fla. 3d Dist. 1964).

68. FLA. APP. R. 4.1 provides that all appellate review of the rulings of these boards shall be by certiorari as set out in the rules. FLA. APP. R. 4.5(c) describes the procedures necessary in certiorari proceedings. FLA. APP. R. 4.5(a)(2) states that an application for a writ of certiorari will not be entertained by the court if questions of fact are raised which will require the taking of testimony. *Accord*, *Bloomfield v. Mayo*, 119 So.2d 417 (Fla. 1st Dist. 1960); *DeGroot v. Sheffield*, 95 So.2d 912 (Fla. 1957).

69. *Schauer v. City of Miami Beach*, 112 So.2d 838 (Fla. 1959), *affirming* *City of Miami Beach v. Schauer*, 104 So.2d 129 (Fla. 3d Dist. 1958), held that the court could not review the motivation of the council's action in adopting an amendment to a general zoning ordinance. That action was a "legislative" rather than a "quasi-judicial" function.

70. 164 So.2d 881 (Fla. 3d Dist. 1964).

71. DADE COUNTY, FLA., METROPOLITAN CODE § 33-316 (1959).

No person aggrieved by any zoning resolution, order, requirement, decision

validity of the rescission. The circuit court quashed the resolution calling for a rescission. However, on appeal the decision was favorable to the county. The circuit court did not have jurisdiction to nullify the legislative action of the Board of County Commissioners by traditional certiorari.⁷²

*Sun Ray Homes, Inc. v. Dade County*⁷³ held that an action by the Board of County Commissioners, in reviewing an interpretation and application of an ordinance by the Zoning Appeals Board, is a quasi-judicial function; therefore, traditional certiorari was the proper method of review.

To summarize, in seeking judicial review from the determination of a zoning authority, the correct procedure will depend upon the following factors: (1) if the administrative body is a municipal authority or a county authority; (2) whether the attack is on the validity of the ordinance as a whole or whether the attack is upon a quasi-judicial determination of the zoning authority. Depending upon the answer to the first question, review will be by either statutory certiorari, in the form of a trial *de novo*, or by traditional certiorari, in which only the record below will be reviewed to see if the evidence supported the decision. The

or determination of an administrative official or by any decision of the zoning appeals board may apply to the court for relief unless he has first exhausted the remedies provided for herein and taken all available steps provided in this article. It is the intention of the board of county commissioners that all steps as provided by this article shall be taken before any application is made to the court for relief; and no application shall be made to the court for relief except from resolution adopted by the board of county commissioners, pursuant to this article. In view of the lack of a legislatively prescribed method to apply to a court of competent jurisdiction to review a decision of the board of county commissioners, when adopted pursuant to this article, it is intended and suggested that such *decisions may be reviewed by the filing of a petition for writ of certiorari* in the circuit court of the eleventh judicial circuit in and for Dade County, Fla., in accordance with the procedure and within the time provided by the Florida Appellate Rules for the review of the rulings of any commission or board. (Emphasis added.)

72. In *Harris v. Goff*, 151 So.2d 642, 644 (Fla. 1st Dist. 1963), on interlocutory appeal, it was asked

What is the proper method of obtaining judicial review of a county zoning resolution where the statute empowering the county to legislate in this field does not provide the procedure to be followed in seeking the relief permitted?

In *Goff*, the Board of County Commissioners contended that the proper procedure was certiorari, not by a direct proceeding in equity for an injunction as was sought by the plaintiff. The board contended that the FLORIDA APPELLATE RULES, discussed note 68 *supra*, were exclusive.

The first district held that the board's contention was valid—if the board's proceedings were judicial or quasi-judicial in character. To be judicial or quasi-judicial, the statute under which the board or agency acts must require notice and hearing and the judgment of the board must be founded on the evidence and testimony presented at the hearing.

See generally Pickar, *Survey of Administrative Law*, 12 U. MIAMI L. REV. 261, 273 (1958), where the case of *DeGroot v. Sheffield*, 95 So.2d 912 (Fla. 1957) is discussed. That case indicates the correct route to judicial review of administrative action when the appropriate statute fails to provide for such review or fails to indicate the method. See also Comment, 2 MIAMI L.Q. 181 (1947).

73. 166 So.2d 827 (Fla. 3d Dist. 1964).

answer to the second question will determine whether an original suit in equity will be proper rather than either statutory or traditional certiorari.

III. ZONING FOR AESTHETICS

Traditionally, the police power could not be used to accomplish primarily aesthetic objectives.⁷⁴ While aesthetic bases for zoning regulations are presently considered desirable, such considerations do not, by themselves, give vitality to such ordinances under substantive due process.⁷⁵ If, as in areas of Florida where the attractiveness of a community has a substantial influence upon its economy, aesthetic zoning can be effectively related to the general welfare, the regulations will be upheld.⁷⁶

An ordinance which places an entire municipality into a residential district is not per se arbitrary and unreasonable. Assuming a relationship to health, safety, morals or the general welfare, it will be upheld.⁷⁷ In *Blank v. Town of Lake Clarke Shores*,⁷⁸ the court stated that the result of an order to rezone one piece of property might necessitate the rezoning of all property, thereby destroying the entire residential zoning plan by "judicial erosion."

IV. EQUITABLE ESTOPPEL

Failure to enforce a valid police regulation in one case or in many cases does not affect the power to enforce it in other cases.⁷⁹ In *City of Miami v. Walker*⁸⁰ the owner of commercial property sought to erect a gasoline station. He challenged the constitutionality of an ordinance that required a seven hundred and fifty foot distance between filling stations, putting weight on the fact that the city had granted seventy-five variances

74. Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW & CONTEMP. PROB. 218 (1955).

75. *Watson v. Mayflower Property, Inc.*, 177 So.2d 355 (Fla. 2d Dist. 1965).

76. *Merritt v. Peters*, 65 So.2d 861 (Fla. 1953); *City of Miami Beach v. Ocean & Inland Co.*, 147 Fla. 480, 3 So.2d 364 (1941); *City of Sarasota v. Sunad, Inc.*, 114 So.2d 377 (Fla. 2d Dist. 1959), *rev'd*, *Sunad, Inc. v. City of Sarasota*, 122 So.2d 611 (Fla. 1960).

[A]esthetic considerations have . . . been recognized and . . . [are] particularly relevant to the community of Miami Beach because of its general character

It is difficult to see how the success of Miami Beach could continue if its aesthetic appeal were ignored because the beauty of the community is a distinct lure to the winter traveler. *City of Miami Beach v. Ocean & Inland Co.*, *supra* at 367.

Justice Barnes' dissent in *Merritt v. Peters*, *supra* at 862, contended that *City of Miami Beach v. Ocean & Inland Co.* is not authority for holding "aesthetic grounds alone" are sufficient grounds for the application of police power.

National attention has recently been focused on aesthetics because of the "beautification program" spurred on by Mrs. Lyndon B. Johnson, our First Lady. *Wall Street Journal*, Jan. 27, 1966, p. 1, col. 1.

77. *Gautier v. Town of Jupiter Island*, 142 So.2d 321 (Fla. 2d Dist. 1962).

78. 161 So.2d 683 (Fla. 2d Dist. 1964).

79. 2 BOYER, *FLORIDA REAL ESTATE TRANSACTIONS* § 38.10(4) (1964).

80. 169 So.2d 842 (Fla. 3d Dist. 1965).

from that regulation. The chancellor held that the ordinance, as applied to the particular property, was discriminatory and unconstitutional. The third district reversed. Whether the city had permitted several hundred or a few filling stations to be within the prohibited distance is conclusive of nothing. The city had not waived, nor was it equitably estopped from enforcing, the terms of the ordinance.

Likewise, just because an owner of land relied upon the existing "business" zoning classification when he purchased the land, he cannot claim that the zoning body is equitably estopped from subsequently rezoning the land as residential. *Edelstein v. Dade County*⁸¹ held that a property owner does not have a vested right in a particular zoning in the absence of an expenditure of money on the land in compliance with existing zoning.⁸²

A clear case of equitable estoppel was presented in *City of Gainsville v. Bishop*.⁸³ An ordinance was amended so that gasoline stations were a permitted use. Relying upon the amendment, the present owner bought real estate, obtained a permit, and incurred substantial expense arranging for construction and mortgage commitments. The change of zoning became a political issue in a campaign. After the election, the ordinance was again amended so that gasoline stations would be barred. The ordinance, in essence, had become a political football. The decision by the chancellor, estopping the city, was affirmed on appeal. The undisputed evidence established that the aggrieved property owner, in good faith reliance upon the city's action in rezoning the subject property to permit its use for a gasoline station, changed his position materially and incurred substantial expense. The city was now equitably estopped from revoking the issued building permit and could not change the ordinance again.⁸⁴

V. CHANGE IN CONDITIONS

A change in conditions may cause a once valid ordinance to become invalid. Even though the same landowner may have previously attacked the zoning ordinance and lost, a change in conditions would allow him to enter another contest with the zoning authorities.⁸⁵

The factual situation presented in *City of Miami Beach v. First*

81. 171 So.2d 611 (Fla. 3d Dist. 1965).

82. *Accord*, *City of Miami Beach v. 8701 Collins Ave.*, 77 So.2d 428 (Fla. 1954); *Sarasota County v. Walker*, 144 So.2d 345 (Fla. 2d Dist. 1962).

83. 174 So.2d 100 (Fla. 1st Dist. 1965).

84. *Accord*, *Sakolsky v. City of Coral Gables*, 151 So.2d 433 (Fla. 1963); *Bregar v. Britton*, 75 So.2d 753 (Fla. 1954); *Texas Co. v. Town of Miami Springs*, 44 So.2d 808 (Fla. 1950).

85. 2 BOYER, *FLORIDA REAL ESTATE TRANSACTIONS* § 38.10(5) (1964).

Trust Co.,⁸⁶ popularly known as the *Firestone Case*,⁸⁷ came alive once more in *Watson v. Mayflower Property, Inc.*⁸⁸ The property owner sought to cancel a single family dwelling zoning ordinance as it applied to his one thousand foot long, four hundred and fifty foot wide tract bounded on the east by the ocean and the west by a lake. The land immediately to the south and north was zoned to permit motels and hotels, with some land already occupied by such buildings. Qualified witnesses testified that, in their opinion, the highest and best use of the land⁸⁹ was for hotels and apartments. Since the present zoning ordinance became effective, many physical, economic and social changes had occurred in the area. The assessed value of the property had tripled in three years. The land would be valued at four times its present evaluation were it classified less restrictively. The circuit court decreed the ordinance void as applied to the tract and the second district affirmed.⁹⁰ When the reason for zoning restrictions is no longer present, such restrictions should be removed.

VI. RETROACTIVE ZONING, NONCONFORMING USES, VARIANCES

A zoning ordinance is invalid and unreasonable when it attempts to exclude existing uses that are not nuisances. In some states, zoning regulations cannot be made retroactive.⁹¹ Courts may allow nonconforming uses (those that are in existence at the time the zoning regulation classifies the property for more restrictive purposes) to continue because of the obvious injustice to an individual if a new zoning regulation would result in immediate termination of an existing property use.⁹² However, it is generally held that zoning ordinances can eliminate nonconforming uses by: (1) incorporating a "grandfather clause" in the ordinance

86. *City of Miami Beach v. First Trust Co.*, 45 So.2d 681 (Fla. 1949), rehearing, 45 So.2d 687 (Fla. 1950).

87. In *Firestone*, the land in question was ocean front property, bounded on the west by Indian River. Land to the south was zoned for hotels and apartment houses, while land a little farther north of the Firestone Estate was also zoned for hotels. Other facts that made the *Mayflower* case on "all fours" were as follows: the local population has recently increased vastly; if rezoned, the value of the property would quadruple; the taxes on the property had risen out of proportion to its present zoned use; the income produced by renting the property as restricted was minimal; the general area of the property had become heavily congested because of mushrooming changes; and the "aesthetic" argument of the city and the landowners from across Indian River had no weight. See Wright, *Zoning Under the Florida Law*, 7 *MIAMI L.Q.* 324, 334-344 (1953).

88. 177 So.2d 355 (Fla. 2d Dist. 1965). This case is also discussed in text accompanying note 29 *supra*.

89. The purpose of zoning laws is to put the land to the uses to which it is best adapted. *Forde v. City of Miami Beach*, 146 Fla. 676, 1 So.2d 642 (1941).

90. "The excellent final decree by the Chancellor." Circuit Court Judge Lamar Warran of Broward County, was quoted in length by the Second District. *Watson v. Mayflower Property, Inc.*, 177 So.2d 355, 362 (Fla. 2d Dist. 1965).

91. 8 *McQUILLIN, MUNICIPAL CORPORATIONS* § 25.181 (3d ed. rev. 1957).

92. *Fortunato v. City of Coral Gables*, 47 So.2d 321 (Fla. 1950).

(setting a date under which the property owners can gradually eliminate the nonconforming use); (2) not allowing a nonconforming use to be re-established after it has discontinued; and (3) not allowing repairs or structural changes on the property.⁹³ The courts, recognizing the purpose of zoning laws, view the legislative intent with liberality so as to restrict, not expand, nonconforming uses.⁹⁴

Recently, Dade County successfully eliminated an existing nonconforming use by converting it into a conditional nonconforming use and then cancelling the use for breach of the condition. In *Smalleylogics Corp. v. Dade County*,⁹⁵ an application for a special variance permit to enlarge a thirty acre nonconforming use, by allowing such use on an additional nine acres, was approved as the owner guaranteed that certain conditions would be adhered to. The variance permit was subject to cancellation for violation of the conditions.

After violation of a condition, the owner was required to show cause why the resolution should not be cancelled. After notice, public hearing, and administrative appeal, the Board of County Commissioners directed that *all* permits authorizing nonconforming use on any and all portions of the property, including the total thirty-nine acres, be "phased out" within the following ten months.

The owner then filed a complaint in the circuit court praying for a decree adjudicating that the resolutions unreasonably and unlawfully attempted to nullify a previous nonconforming zoning use. Upon a dismissal of the complaint with prejudice,⁹⁶ the owner appealed to the third district, where it was held that the conditions of the variance permit were not confined to the nine acres, but applied to the entire property. The original existing nonconforming use was converted into a *conditional* nonconforming use or variance. Use of the property in violation of the conditions, imposed in granting the special variance permit, justified forfeiture of the right to the conditional nonconforming use as to the entire property.

A city cannot refuse to issue a permit to a property owner which would enable him to make the most liberal use of his land within the re-

93. 2 BOYER, *FLORIDA REAL ESTATE TRANSACTIONS* § 38.12 (1964); Norton, *Elimination of Incompatible Uses & Structures*, 20 *LAW & CONTEMP. PROB.* 305 (1955); Note, 6 *MIAMI L.Q.* 135 (1951). Of course, if a nonconforming use constitutes a nuisance in fact, it may be eliminated under that theory.

94. *Standard Oil Co. v. City of Tallahassee*, 87 F. Supp. 145 (N.D. Fla. 1949), *aff'd*, 183 F.2d 410 (5th Cir. 1950), *cert. denied*, 340 U.S. 892 (1950), stated that Florida municipalities have established their power to eliminate nonconforming uses.

95. 176 So.2d 574 (Fla. 3d Dist. 1965).

96. Apparently, the trial judge's order was based upon the conclusion that the plaintiff had misconceived its remedy. The Third District affirmed on the ground that the complaint failed to state a cause of action. "[B]ecause of the often expressed principle that the order of a trial judge will be sustained on appellate review if it is correct, even though upon a ground other than that given by the trial judge." *Id.* at 576.

strictions of the particular zoning area. This is true even if all the surrounding properties are single residences and a landowner wants to build a gasoline station, a permitted use. In *City of Hollywood v. Pettersen*,⁹⁷ the circuit court issued a writ of mandamus⁹⁸ to the city either to issue the permit or show cause why it should not. The contention of the city was that it had shown a prior intention to rezone the land as residential and had, in fact, advertised for a public hearing after the issuance of the writ. This, the city argued, constituted "zoning in progress." However, the second district said this would be, in reality, the adoption of retroactive zoning regulations by which the city was trying to justify its failure to complete the process of amending its zoning ordinance.

Proof that literal enforcement of provisions of a zoning regulation would result in unnecessary hardship is a prerequisite to the award of a variance.⁹⁹ The hardship must be unique to the individual landowner, not shared by others in the area.¹⁰⁰ If the only hardship shown is economic advantage to another, it is not sufficient to warrant a variance as long as the property could be used for its zoned use.¹⁰¹

Also, when a person applies for a variance he is, in effect, admitting the validity of the zoning ordinance, and he may not thereafter contest the constitutionality of the regulation, even as applied to his property.¹⁰²

VII. REGULATION OF A GOVERNMENTAL PROPRIETARY FUNCTION BY ZONING

A governmental body, if operating in a proprietary capacity, is subject to the zoning regulations of the area in which it operates, absent specific legislation to the contrary.¹⁰³

The question of whether one city may impose its zoning regulations on another arose in *City of Treasure Island v. Decker*.¹⁰⁴ In 1937, under statutory authority, the city of Treasure Island constructed a causeway between itself and St. Petersburg, with the eastern half of the causeway

97. 178 So.2d 919 (Fla. 2d Dist. 1965).

98. Although the city charter had a provision therein that no suit may be instituted against the city unless a written statement giving the particulars of the alleged cause of action be filed with the city attorney at least thirty days before such suit is instituted, that provision does not apply to the common law writ of mandamus. FLA. CONST. art. III, § 20 states that "The Legislature shall not pass special or local laws . . . regulating the practice of courts of justice. . . ."

99. FLA. STAT. § 176.14(3) (1965); DADE COUNTY, FLA., METROPOLITAN CODE § 33-311(e) (1959).

100. 35 FLA. JUR. *Zoning Laws* § 24 (1961).

101. *Dade County v. Frank N' Bun Operating Co.*, 169 So.2d 875 (Fla. 3d Dist. 1964).

102. *Servatt v. Dade County*, 173 So.2d 175 (Fla. 3d Dist. 1965).

103. *Nichols Engineering & Research Corp. v. State ex rel. Knight*, 59 So.2d 874 (Fla. 1952); *State ex rel. Helseth v. Du Bose*, 99 Fla. 812, 128 So. 4 (1930).

104. 174 So.2d 756 (Fla. 2d Dist. 1965).

located in St. Petersburg. The toll gate had been located in the middle of the causeway, but a permit was sought by the city of Treasure Island to have the toll gate moved to the St. Petersburg end of the causeway. Since the land under the causeway on the St. Petersburg side was zoned residential, a toll gate would not have been permitted there, but municipal uses would be allowed.

It was held that a toll gate was not a "municipal use" but was a proprietary function,¹⁰⁵ subject to local residence zoning.

VIII. CONCLUSION

In zoning, the function of the court and the function of the legislative body is, in theory, clearly defined. The court's duty is to determine whether the governmental body was within the limits of its power and if the public *gain* under due process outweighs the individual's *loss*. The legislature's duty is to promulgate the law, taking into account the benefits and burdens to the public. Although the words "gain" and "loss" convey a sense of exactness when used in the accounting or tax fields, such is far from the case in the law of zoning. The Florida Legislature has granted a wide discretion to local zoning officials. The courts should, in turn, recognize this grant of power by clothing the local governmental bodies with a presumption of validity.¹⁰⁶ Although the identity of the beneficial recipient of the presumption remains unsettled in Florida, the onus of proof probably remains on the landowner to prove an ordinance to be invalid under substantive due process. The presumption of validity, which should be a substantial presumption attached to the findings of a zoning board, is defensible once one recognizes that judges do not, and probably should not consider themselves experts in the field of zoning.

Certainly as long as the Florida property owner is protected by his constitutional safeguards of substantive and procedural due process, his rights to administrative and judicial review by a judiciary, which will review facts and overrule the legislative body when it acts capriciously, our property owners need not fear losses from unreasonable or irrational whims of zoning officials.

105. *Day v. City of St. Augustine*, 104 Fla. 261, 139 So. 880 (1932).

106. See discussion of "presumptions" in text accompanying notes 13 to 34, *supra*.